No. 89-747

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHICAGO CABLE COMMUNICATIONS,
SOUTH CHICAGO CABLE, INC., and
CABLE OF CHICAGO, INC.,

Petitioners,

v.

CHICAGO CABLE COMMISSION, and
CITY OF CHICAGO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' JOINT REPLY BRIEF

JOHN P. COLE, JR.*
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 659-9750

JAMES E. BETKE
MCDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, IL 60603
(312) 372-2000

Attorneys for Petitioners
Chicago Cable Communications
South Chicago Cable, Inc.
Cable of Chicago, Inc.

* *Counsel of Record*

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The question here is whether the City of Chicago, whatever its goal, may constitutionally regulate programming distributed over cable television lines to prescribe subject-matter (even in terms of broad parameters) and to restrict its locale of production. Essential to resolution of this question, regardless of the magnitude of the speech-restriction, is agreement on the "standard of review" by which the regulation is to be evaluated in the context of the First Amendment. The courts below held that "standard" to be

the interest-balancing test of *United States* v. *O'Brien*.[1] The City now argues that the Seventh Circuit's treatment of the First Amendment question "is merely *dicta*" because the regulation and "the fines [imposed thereunder do] not implicate the First Amendment in any way". Opp. at 5. This argument is tacit admission by respondents that *O'Brien* is inapposite to review of regulations that facially and purposefully restrict the free exercise of communicative activity.

According to the City, the "local origination requirement at issue is not related to the content of speech" because it "provides an outlet for community self-expression, creates an opportunity for improved communications between residents of the City, and encourages localism, community pride, and cultural diversity . . . [,] goals hav[ing] nothing to do with the content of the programming . . .". Opp. at 9. It is the City's position that direct supervision of petitioners' programming is constitutionally permissible because the "requirement serves several substantial purposes." *Id.* Under this theory, government, provided *only* that its "purpose" is adjudged "substantial", is freed of First Amendment constraint and conceptually would be allowed to apply similar content-based restrictions to other local media, including newspapers and broadcast stations, as well as to "speakers" such as motion-picture theaters. For those vehicles of communication, like cable systems, similarly possess the capacity to "provide[ ] an outlet for community self-expression", to "create[ ] an opportunity for improved communications between resi-

[1] 391 U.S. 367 (1968).

dents of the City" and to "encourage localism, community pride and cultural diversity".

Under the City's First Amendment analysis, as well as that of the court below, local broadcast stations or newspapers may be required, at least to a "modest" or "small" degree, to "gear" the content of their communications to officially prescribed goals and to "produce" minimal portions of their communicative offerings within the City. Opp. at 9.[2] Constitutionally speaking, there is no distinction between the City's "L.O. regulation" as applied to petitioners' cable communications, and, for example, a requirement that *The Chicago Tribune* dedicate a few columns or pages "out of the hundreds" printed each week to promotion of City-sponsored goals, *id.*, or that it "produce" a prescribed "quota" of the publication's content "in the City of Chicago." Opp. at 4.[3] Faced once with essentially this same issue, this Court said:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publications of news

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[2] Like the courts below, the City persists here in the erroneous belief that an "incidental" restriction on speech within the context of *O'Brien* is one where the "intrusion" may be described as "small". Opp. at 10. *See* Petition at 12 n.15 and 14-16.

[3] Newspapers use public property in a variety of ways to distribute their product and frequently must negotiate with local government in such regard. Broadcast stations similarly must obtain local zoning clearances for transmitting towers, etc. Under the First Amendment theory espoused below, cities, provided only that their goals are deemed "substantial", might lawfully condition such authority on agreement by those media-interests to subject their *communicative activities* to a modicum of regulation.

> or opinion by inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the functions of editors .... The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper ...—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Pub. Co. v. *Tornillo*, 418 U.S. 241, 258 (1974). Regulatory "goals", however lofty or ambitious, neither negate nor obviate the command of the First Amendment. *Id.* at 256 ("A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated").

Manifestly, a cable operator's choice of "programming" subject-matter, and the determination of where and by whom such communications are to be produced, "constitute the exercise of editorial control and judgment" protected by the First Amendment. That these underlying "editorial judgments" are made by a cable-television editor instead of by a newspaper editor is a "distinction" without First Amendment significance. Neither the Seventh Circuit nor the respondents here demonstrate "how government regulation of this crucial process" is rendered less inviolate under the Constitution because the medium of dissemination is that of the electronic press rather than the print model.[4]

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[4] The Seventh Circuit summarily concludes below that "[u]nlike

The instant case is totally unlike *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), where the purpose of the regulation there at issue was to restrict "visual clutter" and thereby to control a "public nuisance", 466 U.S. at 809, goals *unrelated* to the communication and the communicative activity in question.[5] Here, in contrast, Chicago's L.O. regulation is not only aimed at the *origin* and *content* of the communications in question, it is the *communication* itself by which the City purports to further its stated goals. *See, e.g.*, 879 F.2d

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the traditional forms of print media a cable programmer enjoys a virtual monopoly over its area", and that this fact gives the City the right "to proffer some requirements guaranteeing that the cable customers are, to the extent possible, accorded a range of programming from the franchisee, since the cable viewing public has no other channel to which to turn". *Chicago Cable Communications* v. *Chicago Cable Commission*, 879 F.2d 1540, 1550 (1989), App. 18a-19a. This observation would seem to be offset, if not belied, by respondents' acknowledgment that petitioners' systems, in addition to their locally originated programming, offer their subscribers "hundreds of hours [of programming] on 60 different channels each week." Opp. at 9. The fact is that petitioners' cable services are *by far* the greatest contributor to video diversity in the Chicago market. That cable subscribers have access to a range of 60 channels of programming, while non-subscribers may access only a fraction of such services, is hardly reason or justification to compromise the First Amendment freedoms of the cable-television provider. *See Miami Herald Pub. Co.*, 418 U.S. at 249-254.

[5] Neither is this case similar to *Ward* v. *Rock Against Racism*, 109 S.Ct. 2746, 2754 (1989), another "nuisance" case where the sole purpose of the municipal regulation was "to control noise levels . . . and to avoid undue intrusion into residential areas", a form of restriction found there to "satisf[y] the requirement that time, place, or manner regulation be content-neutral". Chicago's L.O. regulation is far more than the reasonable supervision of the "time, place or manner" of petitionrs' speech.

at 1549-50, App. 16a-18a. Unlike *Taxpayers for Vincent*, where no party questioned the "constitutional power of the City to attempt to improve its appearance", 466 U.S. at 805, or *Rock Against Racism*, where "it can no longer be doubted that government 'ha[s] a substantial interest in protecting its citizens from unwelcome noise' ", 109 S.Ct. at 2765 (quoting *Taxpayers for Vincent*, 466 U.S. at 806), petitioners fundamentally contest the constitutional power of government facially to regulate their programming and to compromise the free exercise of their editorial discretion.[6]

When the issue is whether a particular regulation "abidg[es] the freedom of speech, or of the press", the decisions of this Court make plain that the pivotal determination is one of invoking the proper standard of review. If all that government requires in order to restrict the subject-matter and source of production of programming distributed via communications media is a simple interest-balancing test, and a determination that the avowed regulatory goals *outweigh* (and thus *override*) the First Amendment guarantees of a free press, then the courts below were correct in their disposition of this case. We respectfully urge, however, that the facts *sub judice* require application of

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[6] While regulations designed to achieve "noise abatement" or "clean cities" presumptively fall "within the constitutional power of the Government", *O'Brien*, 391 U.S. at 377, a governmental restriction *directly placed* on the exercise of petitioners' editorial discretion, whatever the regulator's "goal" or "substantiality of interest", does not, *O'Brien*, therefore is inapposite to review of the City's L.O. regulations. By applying *O'Brien*, the courts below deny petitioners the protection guaranteed by the First Amendment.

a more rigorous standard of First Amendment review than the "less demanding" evaluation contemplated by *O'Brien*, and that the subject petition should accordingly be granted to clarify this important, and frequently misunderstood, corner of constitutional law.

Respectfully submitted,

JOHN P. COLE, JR.*
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 659-9750

JAMES E. BETKE
McDERMOTT, WILL & EMERY
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